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Tooele Associates Limited Partnership; Perry, Tooele Associates, LLC; Perry Homes Inc.; and L.H. Perry Investments, LLC v. Tooele City; and Tooele City Water Special Services District : Tooele City v. Forsgren Associates, Inc., and Ames Construction, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TOOELE ASSOCIATES LIMITED PARTNERSHIP; PERRY/TOOELE ASSOCIATES, LLC; PERRY HOMES, INC.; and L. H. PERRY INVESTMENTS, LLC, Plaintiffs/Appellants, vs. TOOELE CITY; and TOOELE CITY WATER SPECIAL SERVICES DISTRICT, Defendants.	Appellate Case No. 20090694-CA
TOOELE CITY, Third-Party Plaintiff, vs. FORSGREN ASSOCIATES, INC., and AMES CONSTRUCTION, INC., Third-Party Defendants.	

BRIEF OF APPELLEE, TOOELE CITY

Appeal from the March 16, 2009 Memorandum Decision and Order Based Upon the June 25, 2009 Rule 54(b) Certification of the Third Judicial District Court of Salt Lake County, State of Utah
The Honorable Randall N. Skanchy, District Court Judge

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I. PARTIES.

All parties to this action are listed in the caption, above. Of those parties, only Tooele City and Tooele Associates, L.P. are parties to this appeal.

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IV. JURISDICTIONAL STATEMENT.

On October 22, 2009, this Court denied Tooele City's Motion to Dismiss Appeals for Lack of Jurisdiction and Suggestion of Mootness. Events following October 22, 2009, however, indicate that Tooele Associate, L.P.'s ("TA") storage lake allegations are moot, and that the order granting summary judgment dismissal of those allegations, and denying TA's cross-motion for summary judgment, was not certifiable as final under Rule 54(b) of the Utah Rules of Civil Procedure. Thus, the mootness of TA's storage lake allegations, and whether the order dismissing them was certifiable under Rule 54(b), are issues in this appeal.

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

1. Did the district court abuse its discretion in declining to enter an equitable decree of specific performance, requiring Tooele City ("City") to maintain 17 storage lakes to a leakage standard that TA's counsel admitted during oral argument was absent from the Development Agreement?

This appeal does not involve a breach of contract claim for *any* type of relief. TA makes clear in its brief that it is seeking "equitable relief, such as an injunction." (Brf. of Applt. at 41.) TA took the same position before the district court. TA disclosed no damages computation in connection with its storage lake allegations, and TA's counsel admitted before and during oral argument that TA sought an equitable order of specific performance. (R. at 15004, 22694 p. 40.) Thus, the issue on appeal is not simply whether the Development Agreement supports *any* type of relief in connection with TA's

storage lake allegations, but whether the district court erred in declining to exercise its equitable authority and decree specific performance against a governmental entity.

A district court's decision to exercise or not exercise its equitable authority is reviewed for an abuse of discretion. Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981). That standard of review applies, even though the decision was made in the summary judgment context. Baker v. Imus, 2009 UT App 155, ¶ 5, 211 P.3d 987 (district court's equitable estoppel ruling was accorded "a fair degree of deference," even though ruling was made in a grant of summary judgment (quotations omitted); Ward v. Richfield City, 776 P.2d 93, 95-96 (Utah Ct. App. 1989) (summary judgment order in which district court declined to exercise equitable power reviewed for abuse of discretion).[1]

Furthermore, TA may have the district court's decision reversed only if TA proves that the Development Agreement required the City to *maintain* 17 storage lakes to a ¼" per day seepage standard. On January 15, 2009, the district court ruled from the bench that the storage lakes' design and construction were beyond reproach. (R. at 22694 pp. 48-49.) Written orders dated February 19 and 20, 2009, followed the district court's bench rulings. (R. at 18859-66.) TA's notice of appeal makes no mention of the district

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[1] See also Spaulding v. United Trans. Union, 279 F.3d 901, 908, 911 (10th Cir. 2002) (reviewing district court's refusal to apply equitable estoppel for abuse of discretion, even though such refusal was in context of summary judgment); Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 30-32 (1st Cir. 2004) (reviewing district court's application of judicial estoppel for abuse of discretion, even though application arose in summary judgment context); Stallings v. Mussmann Corp., 447 F.3d 1041, 1046-47 (8th Cir. 2006) (same); South Plains Switching, Ltd. v. BNSF Ry. Co., 255 S.W.3d 690, 698, 703 (Tex. Ct. App. 2008) (reviewing district court's JNOV denial of specific performance under abuse of discretion standard).

court's January 15, 2009 bench rulings or the February 19 and 20, 2009 orders. (R. at 22344-45.) Orders omitted from a notice of appeal may not be challenged on appeal. Utah R. App. P. 3(d); Jensen v. Intermountain Power Agency, 1999 UT 10, ¶¶ 7-9, 977 P.2d 474. Consequently, TA may not seek a reversal based on alleged defects in the design or construction of the storage lakes.

The City would be unfairly prejudiced if TA could challenge on appeal the district court's orders absolving the design and construction of the storage lakes. In response to TA's storage lake allegations, the City asserted third party claims against Ames Construction, Inc. ("Ames"), which constructed the storage lakes, and Forsgren Associates, Inc. ("Forsgren"), which designed the storage lakes and oversaw their construction. (R. at 24079-85, 14405, 14467.) After TA could identify nothing wrong with the storage lakes' design and construction, the district court entered summary judgments for Ames and Forsgren. (R. at 22694 pp. 48-49, R. at 18859-66.) Although the City appealed those judgments in case TA succeeded in appealing the dismissal of TA's storage lake allegations (R. at 22338-40, 22516-17), Forsgren and Ames are not parties to TA's appeal. Thus, this Court's consideration of a challenge by TA to the design and construction of the storage lakes in this appeal could lead to inconsistent decisions if, for example, TA succeeds in this appeal in challenging the design and construction, but a later Court of Appeals panel sides with Forsgren and Ames in the separate appeal.

2. Does TA's formal election of monetary damages as its remedy on its breach of the Development Agreement claim moot an appeal of the dismissal of TA's storage lake allegations, for which TA seeks an equitable decree of specific performance?

Mootness goes to this court's subject matter jurisdiction, and "'[t]his court is the exclusive judge of its own jurisdiction.'" Powell v. Cannon, 2008 UT 19, ¶ 9, 179 P.3d 799 (quoting Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶ 18, 44 P.3d 663).

3. Was the district court's order granting summary judgment dismissal of TA's storage lake allegations certifiable under Rule 54(b) of the Utah Rules of Civil Procedure?

"The propriety of a trial court's determination that an order is amenable to rule 54(b) certification is a question of law that we review for correctness." Williams v. Bench, 2008 UT App 306, ¶ 8, 193 P.3d 640.

VI. STATEMENT OF THE CASE.

A. Nature Of The Case, Course Of Proceedings, And Disposition In Court Below.

1. TA Presented No Evidence That The Storage Lakes Were Designed Or Constructed Improperly, And TA Could Identify No Provision In The Development Agreement That Required The City To Maintain 17 Storage Lakes.

TA, along with the other plaintiffs, cloaked its claims in the guise of a breach of contract action to circumvent the Governmental Immunity Act of Utah, Utah Code Ann. § 63G-7-101, *et seq.* Although plaintiffs based their claims on a contract – the December 18, 1997 Development Agreement for Overlake Project Area Tooele City, Tooele County, Utah ("Development Agreement") – the district court ruled that many of the

duties that plaintiffs alleged the City breached were set forth nowhere in the Development Agreement. (R. at 2311, 2378-91, 3587-97, 10743, 10756, 20836.) TA's storage lake allegations typify plaintiffs' approach.

In its First Amended Complaint, filed on June 14, 2006, TA first alleged that the City breached the Development Agreement by improperly designing, constructing, and maintaining the storage lakes. (R. at 3806 ¶ 285, 3809 ¶¶ 309-10.) In response to such allegations, the City asserted third party claims against Ames, which constructed the storage lakes, and Forsgren, which designed them and oversaw Ames' construction work. (R. at 24079-85, 14415, 14467.)

Later, TA's sole managing general partner, Drew D. Hall,[2] testified during his deposition that TA had no basis to complain about the design and construction of the storage lakes, and he "stuck [his] foot in [his] mouth" when he made such allegations:

> Q. . . . [Y]ou have no basis to say that the lakes were built improperly?
>
> A. No, I'm not – I'm not professionally qualified to make that statement. I know I stuck my foot in my mouth and speculated, and it was probably inappropriate on my part to make a conclusion that I wasn't technically capable of making. . . .
>
> Q. Okay. Have you seen any evidence that causes you to form the belief that the lakes were built properly?
>
> A. Yeah, I mean – I've watched the lakes be built. I dealt with employees from Ames Construction, and I watched their construction. I thought they were a very professional firm. I thought they did a great job. . . . And so I thought at that point in time they were built properly. . . .

[2] Mr. Hall professed to be "intimately familiar" with "nearly every detail of the development of the Overlake Project Area." (R. at 6679.)

Q. Okay. Same question except with regard to the design, so the question is have you seen evidence that the lakes were, in fact, properly designed?

A. . . . I have no evidence that they were not properly designed.

(R. at 14583-85.) TA presented no evidence that the storage lakes were improperly designed or constructed, which is why the district court granted summary judgment in favor of Ames and Forsgren. (R. at 22694 pp. 48-49, 54-55, 18859-66.)

That left improper maintenance as the only cause of alleged excessive storage lake seepage that TA could advance. (R. at 22694 pp. 54-55.) TA vacillated on the source of a City contractual duty to maintain the storage lakes. The only Development Agreement provision that TA cited in its First Amended Complaint as the source of such a maintenance duty was § XII.1.A., which dealt with "City Park, Open Space, Trail and Buffer Areas." (R. at 3809 ¶ 308.) In its brief to this Court, however, TA does not mention § XII.1.A. as support for the relief TA seeks, which means that TA has abandoned § XII.1.A. as a basis for its storage lake maintenance allegations.[3]

On April 28, 2008, TA filed a Second Amended Complaint, in which TA seemed to omit improper design as a basis for breach of the Development Agreement and instead alleged that the City breached the Development Agreement by "failing to provide, repair and maintain seventeen wastewater storage lakes which function properly and do not leak

[3] Another Development Agreement provision that TA cited to the district court, which is not even mentioned in TA's brief, is the "FURTHER ASSURANCES" clause – § XV. (R. at 14997 (citing § XV of Dev. Agr.).) TA also argued that it was a third-party beneficiary of the City's contracts with Ames and Forsgren. (R. at 18790.) TA, however, does not make those arguments in its brief. Because TA has abandoned its arguments under §§ XII.1.A and XV of the Development Agreement and its third party beneficiary contentions, the City will not respond to them herein.

beyond applicable specifications and industry standards." (R. at 13445 ¶ 129.a.) This time, TA cited no Development Agreement provision that imposed a storage lake maintenance obligation on the City. In addition, TA added allegations that the City "allow[ed] the storage lakes to overflow on one or more occasions" and "fail[ed] and refus[ed] to maintain the property around the perimeter of the storage lakes." (R. at 13449 ¶ 129.b. – c.)

During the January 15, 2009 hearing on the cross-motions for summary judgment regarding TA's storage lake allegations, the district court repeatedly asked TA's counsel to identify the Development Agreement provision that the court could require the City to specifically perform, and TA's counsel could identify none:

> THE COURT: So then what – tell me by going to the development agreement what it is the City is to do by way of specific requirements. I understand that the parties have contracts. Forsgren and the City had contracts before that, that Tooele Associates and Forsgren had a contract, but those are their contracts.
>
> This is – the development agreement defines the relationship between the two of you. If this Court were to look at providing specific performance, you need to help me understand what it is that the City would have to conform to or provide by way of specific performance. I mean what is it?
>
> MR. LARSEN: The City has defined them. A quarter inch per day seepage.
>
> THE COURT: Okay. **Is that in the development agreement?**
>
> MR. LARSEN: **No**, but that's in their reuse plan. But that's how they define store water.
>
> THE COURT: I mean this is the issue. The issue is what's the obligation of the City. . . .

Are we talking third party beneficiary here, or what specific requirement is the City supposed to make to you, other than to provide these ponds that seep and hold water? To what level? I mean what is it I will be require to – require them to do by way of specific performance?

MR. LARSEN: Well –

THE COURT: What is it I'd be required to do way of ambience? There's nothing in the Development Agreement that gives this Court any direction so stated with the arguments you make, for example, about ambience. . . .

MR. LARSEN: No. I mean I'm not saying . . . that there should be this number of . . . fancy balloons bouncing off of the lakes or . . . for a beautiful sunset.

THE COURT: But that's – but the issue that you've got to help the Court with today is what it is that this Court would have to do by way of specific performance that's set forth in the development agreement that's a contract between you and the City to which you have a right to enforce.

MR. LARSEN: Right.

THE COURT: I haven't seen that.

MR. LARSEN: Well, the consideration is spelled out. What it is that we are giving up – and if that consideration fails, you have a contractual failure if we're not entitled to specific performance. I mean that creates an entirely different set of layers of problems.

. . . .

THE COURT: The parties just didn't contract here for the level of performance you've asked this Court to require. There's nothing in there to give the Court direction associated with specific performance as to what it is you ask them to do. . . .

You've got [to] point to the contract to show this is what they didn't do. If it's simply hold, store or circulate, then I understand your argument. That's all you can say about it.

MR. LARSEN: **Well, that's all I can say about it because that's the – that is the – those are the provisions that are contained in the development agreement.**

(R. at 22694, pp. 40-43 (emphasis added).)

Following the January 15, 2009 hearing, TA filed a "supplemental memorandum" to try to identify for the district court a basis for a storage lake maintenance obligation that can be found in the Development Agreement. (R. at 18785-94.) For the first time in seven years of litigation, TA argued that the 1996 Land Application Agreement/Funding Agreement ("Land Application Agreement" also known as "Land Funding Agreement"), which was incorporated into the Development Agreement, imposed upon the City a duty to maintain the storage lakes so that they seep no more than 1/4" per day. (R. at 18786.) One of the problems with TA's new argument was that TA had already judicially admitted (repeatedly) that, under the Land Application Agreement, *TA* was responsible for the storage lakes. (R. at 13440 ¶ 75; see also R. at 2638 n.2, 3759 ¶ 11.b, 3777 ¶ 95.)

In a March 16, 2009 Memorandum Decision and Order, the district court denied TA's cross-motion for summary judgment, granted the City's motion, and dismissed all of TA's storage lake allegations. (R. at 18898.) The district court concluded that TA had identified no provision in the Development Agreement that required the City to maintain 17 storage lakes so they seep no more than ¼" per day. (R. at 18890-98.) The district court also dismissed TA's allegations regarding storage lake overflows and maintenance of the perimeters of storage lakes. (R. at 18890, 18898.) TA's brief to this Court does not challenge those aspects of the district court's order.

2. TA Sought A Decree Of Specific Performance On Its Storage Lake Allegations, But It Elected Benefit-Of-The-Bargain Damages On All Other Aspects Of Its Development Agreement Claim.

Although TA vacillated on a source of a City contractual duty to maintain the storage lakes, TA was clear with regard to the remedy it sought on its storage lake

allegations. TA never disclosed a damages computation with respect to its storage lake allegations, and in its October 15, 2008 opposition to the City's summary judgment motion, TA explained that it was not interested in recovering damages on such allegations. (R. at 15004.) Instead, TA explained, it sought an equitable decree of specific performance. (Id.) During the hearing on the motions for summary judgment regarding TA's storage lake allegations, the district court focused on the relief TA sought, which TA's counsel again identified as specific performance:

> THE COURT: . . . Is it your argument that it's specific performance, because that's what I heard the City say, that you want specific performance.
>
> MR. LARSEN: Right, we want specific performance.

(R. at 22694 p. 40.) In its brief to this Court, TA repeats its demand for a decree of specific performance. (Brf. of Appt. at 41.) Thus, TA has foregone damages in favor of an equitable decree of specific performance on its storage lake allegations.

TA filed this appeal on July 23, 2009. (R. at 22344-45.) On September 25, 2009, the City moved this Court to dismiss the storage lake appeals for lack of jurisdiction and for mootness. The City argued, *inter alia*, that TA's appeal might be mooted by TA's expected election of remedies. In its October 13, 2009 opposition filed with this Court, TA argued, "Nothing has occurred in the trial court that moots the appealed storage pond claim." (TA's 10/13/09 Memo. in Opp. to Mot. to Dis. for Lack of Juris. and Sugg. of Mootness at 6.) This Court denied the City's motion on October 22, 2009.

Eight days later, TA formally elected a remedy on its breach of Development Agreement claim. On October 30, 2009, TA elected a legal remedy – monetary damages,

specifically expectancy damages, to compensate TA for alleged past and future losses of the benefit of its bargain. (R. at 21909-11, 22928-29.) TA also asserted that "it would be duplicitous for Tooele Associates to claim that its rights to specific performance of the Development Agreement or its right to an equitable extension survive." (R. at 22929.)

One of the grounds for the damages TA has elected is an option for a ten-year extension of the Development Agreement. The Development Agreement, including any alleged duty imposed upon the City to maintain the storage lakes, expired by its terms on December 18, 2007, over two-and-a-half years ago, but it allowed "an option to extend the Agreement for an additional ten (10) years if the terms of the Agreement have been substantially complied with." (R. at 14521 § XXIII.) In 2007, the City denied TA's request to exercise the option on the ground that TA failed to substantially comply with the terms of the Development Agreement. (R. at 7490-95.) The City's denial was another aspect of TA's breach of contract claim, for which TA formally elected benefit-of-the-bargain damages as its remedy. (R. at 21848 ¶ n., 21855-58, 22928-29.) Thus, in its October 30, 2009 election, TA opted to cash-in the ten-year extension of the Development Agreement, including any alleged Development Agreement obligation to maintain the storage lakes beyond December 18, 2007.

3. TA's Storage Lake Allegations On Appeal Overlap With The City's Claims, Which Remain Unresolved Before The District Court.

In this appeal, TA asks this Court to reverse the district court's denial of summary judgment in favor of TA on TA's storage lake allegations. (Brf. of Appt. at 41-42.) Part of the City's opposition to TA's motion was that TA materially breached the

Development Agreement, and such breaches excuse and discharge the City's further performance. (R. at 15931-32, 15949-52.) In orders that are not on appeal, the district court ruled that many of the City's material breach claims were sufficiently substantiated to overcome TA's summary judgment motions. (R. at 8549-52; 14362-67.) Some of TA's breaches occurred as early as 1998 and 1999, before the lakes were completed in January, 2000. (R. at 567 ¶ 88, 3783 ¶ 128; 13441 ¶ 81, 23317 ¶ 104, 22429 ¶ 6, 14333, 14362, 14363-67, 11973Ae-11973Ak.) Although a jury in a June, 2009 trial found that the City waived its material breach defenses, the district court has stricken the jury's verdict and ordered a new trial. (R. at 22164-65; 6/3/10 Memo. Dec. and Order on Mots. for Entry of J. at 46, att. as Ex. A.[4])

One of the City's claims that closely overlaps with TA's storage lake allegations on appeal is the City's claim that TA failed to pay for treated wastewater used for golf course irrigation. (R. at 21856.) In this appeal, TA asserts that, under the Development Agreement, it was required to purchase all treated wastewater, which TA cannot do if the water excessively leaks out of the storage lakes. (Brf. of Appt. at 16 (citing R. at 14509).) The City claims that TA has failed and refused to pay for the treated wastewater that it has used. (R. at 21856.) TA's assertion on appeal and the City's claim factually overlap, and the City's claim remains unresolved before the district court.

[4] This Memorandum Decision is the subject of the City's June 15, 2010 Motion to Supplement Record on Appeal, which is pending before this Court.

B. Statement Of Facts.

1. The City Satisfied Its Only Storage Lake-Related Contractual Obligation, Which Was To "Bear All Costs Associated With The Design And Construction Of The New Wastewater Treatment Plant, Including . . . All Storage Ponds Required To Receive Treatment Plant Effluent."

TA and the City entered into three agreements relevant to this appeal, and under the first two, TA was responsible for the lakes. On November 15, 1995, TA and the City entered into the Annexation Agreement, in which TA promised, among other things, to "construct[ ] . . . at its expense" the storage lakes. (R. at 14541 § 5.) On June 1, 1996, TA and the City entered into the Land Application Agreement/Funding Agreement. (R. at 14546.) Under the Land Application Agreement/Funding Agreement, all obligations with respect to the storage lakes were TA's, as TA has repeatedly judicially admitted. (R. at 2638 n.2, 3759 ¶ 11.b, 3777 ¶ 95, 13440 ¶ 75.)

The third agreement is the December 18, 1997 Development Agreement. (R. at 14501.) Most of the Development Agreement had nothing to do with storage lakes. TA described the purpose of the Development Agreement as follows:

> On December 18, 1997, Tooele Associates and the City entered into a comprehensive "Development Agreement for Overlake Project Area" (the "1997 Development Agreement") to provide for a master plan, zoning, development, allowed uses, allowed densities, dwelling unit sizes, parking and architectural standards, as well as the phasing of development, and to specify the parties' respective obligations with respect to services and facilities for culinary water, irrigation water, sanitary sewer, transportation, flood control, police and fire protection, parks and open space areas and other aspects relevant to development of Overlake.

(R. at 558-59 ¶ 37, 3775-3776 ¶ 89.) According to TA, the primary consideration the City provided in the Development Agreement was "the entitlement rights contained in the Development Agreement." (R. at 4970.)

With respect to the storage lakes, the Development Agreement modified the Annexation Agreement and the Land Application Agreement/Funding Agreement to the extent that, under § VI.1.B., the City assumed the duty to "bear all costs associated with the design and construction of the new wastewater treatment plant, including . . . all storage ponds required to receive treatment plant effluent." (R. at 14511 § VI.1.B.) The City satisfied that duty. The City spent $3.6 million to construct the storage lakes, and TA has never alleged that the City failed to bear all the costs of designing and constructing the storage lakes incurred after the Development Agreement's effective date. (R. at 567 ¶ 89, 13427-76.)

The Development Agreement was an integrated agreement:

> XXI. MERGER AND AMENDMENT
>
> This Agreement, together with all Exhibits hereto, which are incorporated herein by reference, constitutes the entire Agreement between the City and Tooele Associates and supersedes any prior understandings, agreements or representations verbal or written.

(R. at 14521 § XXI.) TA conceded that the Development Agreement was integrated and presented no evidence or argument to the contrary. (R. at 14438 ¶ 9, 14973-74.)

2. The Development Agreement Imposed No Duty On The City To Maintain Or Repair The Storage Lakes.

TA has identified three Development Agreement provisions—§§ V.2.E., VI.1.B., and VII.2.D.—and the Land Application Agreement/Funding Agreement, in which, TA contends, the City promised that it would maintain 17 storage lakes so that they seep no more than ¼" of water per day.

a. Section VI.I.B.

As demonstrated above, § VI.1.B. does not support TA's argument, as it required only that the City "bear all costs associated with the design and construction of the new wastewater treatment plant, including . . . all storage ponds required to receive treatment plant effluent." (R. at 14511 § VI.1.B.) Section VI.1.B. is simply a cost-allocation provision, and there is no allegation that the City failed to bear all of such costs after the Development Agreement was signed.

b. Section V.2.E.[5]

Section V.2.E. imposed *no* obligation on the City, let alone a storage lake maintenance duty. The Development Agreement was structured by the various types of services and facilities that pertain to a real estate development project in the City. For example, § V dealt with "WATER SERVICE AND FACILITIES," § VI dealt with "SANITARY SEWER SERVICE AND FACILITIES," and § VII dealt with "TRANSPORTATION FACILITIES AND CIRCULATION SYSTEM." (R. at 14507-14514.) Each section was divided into two sub-sections, the first of which identified

[5] In its brief, TA mistakenly cites this section as § V.1.E. (Brf. of Appt. at 6, 7, 8.)

"City Obligations" (e.g., id. at § V.1., VI.1., and VII.1.), and the second sub-section dealt with "Tooele Associates Obligations." (E.g., id. at § V.2., VI.2., VII.2.) Section V.2.E. was contained within sub-section 2 of § V., which dealt with "Tooele Associates Obligations," *not* the City's.

The fact that § V.2.E. deals with TA's duties is reflected not only in its heading, but also in the substantive text of the provision:

> 2. Tooele Associates Obligations.
>
> In recognition and consideration for the City's commitment herein to provide culinary water necessary to meet the needs of the Overlake Project Area, at build-out, **Tooele Associates voluntarily agrees as follows**:
>
> . . . .
>
> E. Ownership of Secondary Water System Facilities. All facilities necessary to provide a secondary water system for irrigation purposes to all Use Areas, installed by Tooele Associates and within the Overlake Project Area, shall be owned, operated and maintained by Tooele Associates. The secondary water system facilities owned, operated, and maintained by Tooele Associates shall not include the following facilities; the existing City wastewater treatment plant, the new City Wastewater treatment plant, any advanced wastewater treatment facilities, any interceptor or collection facilities carrying wastewater from the existing plant to the new wastewater treatment plant, all ponds constructed to store and circulate treated wastewater, and all facilities for the distribution of treated wastewater between storage ponds.

(R. at 14508-10 (emphasis added).) Thus, § V.2.E. dealt with TA's duties, not the City's.

Moreover, § V.2.E. merely identifies facilities for which TA would not be responsible. A provision that absolves TA of responsibility does not *ipso facto* impose responsibility on the City.

Furthermore, § V.2.E. does not state that the storage ponds will be *maintained* to store and circulate treated wastewater. Instead, it identifies the storage ponds as "all

ponds ***constructed*** to store and circulate treated wastewater." (R. at 14510 (emphasis added).) There is no evidence that the City failed to properly "construct[all ponds] to store and circulate treated wastewater."[6] (R. at 14583-85.)

c. Section VII.2.D.

Section VII.2.D. likewise imposed no obligation on the City. It was contained within a section of the Development Agreement identifying "Tooele Associates Obligations" regarding "TRANSPORTATION FACILITIES AND CIRCULATION SYSTEM." (R. at 14512, 14513-14.) That section provided:

> 2. Tooele Associates Obligations.
>
> In recognition and consideration for the City's willingness to provide the transportation service necessary to meet the demands of the Overlake Project Area at build-out, **Tooele Associates voluntarily agrees as follows:**

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[6] TA describes as a "factor[]" in storage lake leakage "poor compaction and backfill around transfer structures." (Brf. of Appt. at 13.) TA never made that assertion to the district court, including in response to fact statements in the City's summary judgment memorandum asserting that TA lacked evidence of construction defects. (R. at 14444-45 ¶¶ 28-30, 14987-90.) Indeed, TA argued to the district court that Ames' construction work on the lakes and Forsgren's design and oversight were *not* factors in storage lake seepage. (R. at 22694 pp. 38-39.)

Furthermore, TA has cited to this Court no evidence that "poor compaction and backfill around transfer structures" is a cause of storage lake leakage. TA cites record pages 15031-32 and 15435-46 as support for its assertion, but none of those pages, which are portions of the AMEC report, substantiate TA's claim. Page 15435 suggests "*potentially* poor compaction of backfill," but nothing in the report indicates that poor compaction of backfill was a cause of storage lake leakage. (Emphasis added.)

Moreover, TA's storage lake expert rendered no opinion on the cause of storage lake leakage (R. at 14494-97), which is required before TA can challenge the storage lakes' design or construction. Ortiz v. Geneva Rock Prods., Inc., 939 P.2d 1213, 1217 (Utah 1997); Wessel v. Erickson Landscaping Co., 711 P.2d 250, 253 (Utah 1985); Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 263 (Utah Ct. App. 1997).

. . . .

> D. Overlake Participation in Off-Site Road Facilities. In recognition and consideration that the City will be required to construct and provide storage ponds and lagoons, to be provided at a cost to the City and required to receive and hold treated wastewater from the new wastewater treatment plant, and necessary to provide sewer service and treated wastewater for irrigation purposes to the Overlake Project Area, Tooele Associates will participate with the City to provide required off-site transportation improvements, including required improvements to 1000 North Street. Tooele Associates shall reimburse the City for the total cost incurred by the City to design, construct and equip all storage ponds and lagoons, located in the Overlake Project Area. Such reimbursement shall be made according to a reasonable schedule, as determined by the City, for City transportation and road construction projects and/or City bond obligations related to financing of the wastewater treatment plant and storage ponds.

(R. at 14513-14 (emphasis added).) Section VII.2.D. dealt with TA's duties.

To the extent § VII.2.D. reflected any duty on the City's part, what § VII.2.D. stated the City "will be required to" do is "construct and provide storage ponds and lagoons." TA argued to the district court that the word "provide" as used in this section means "'[t]o make, procure, or furnish for future use, prepare.'" (R. at 14995 (quoting Black's Law Dictionary 1224 (6th ed. 1990) (emphasis omitted).) The City satisfied TA's interpretation of § VII.2.D. by making, procuring, furnishing, and preparing the storage lakes, and TA admitted that the City did so properly. (R. at 14583-85.)

In any event, § VII.2.D. was superseded in Amendment #4 to the Development Agreement. Subsequent to the execution of the Development Agreement, a dispute arose regarding TA's duty to "reimburse the City for the total cost incurred by the City to design, construct and equip all storage ponds," as set forth in § VII.2.D., and the dispute was resolved through Amendment #4 to Development Agreement for Overlake Project

Area.[7] (R. at 8335-42.) Under Amendment #4: (a) TA transferred to the Tooele City Water Special Services District ("TCWSSD") the secondary water irrigation system that TA installed in the developed areas of Overlake; (b) TA was no longer obligated to purchase all treated wastewater from the new wastewater treatment plant; and, critically, (c) TA and the City waived "any and all" rights arising out of § VII.2.D.:

> 11. Mutual Release. **The Parties** and their respective partners, representatives, affiliates, heirs, successors, assigns, employees, agents, and attorneys hereby **forever release and discharge <u>each other</u>** from any and all claims, demands, liabilities, costs, expenses, or rights of action of any kind or character arising out of Associate's agreement to reimburse the City for the costs of designing, constructing, and equipping the storage ponds under Paragraph VII(2)(D) of the Development Agreement.

(R. at 8338 (emphasis added), 15817-18.) Under this provision, TA waived any and all claims against the City that "ar[o]s[e] out of [its] agreement" under § VII.2.D.

TA admits that the City's alleged duty under § VII.2.D. "ar[o]s[e] out of [TA's] agreement" under § VII.2.D. (R. at 8338 § 11.) TA argues that "the City's duty to construct and provide storage ponds required to receive and hold treated wastewater *is the consideration* the City provided to Tooele Associates in exchange for Tooele Associates' own obligations" under § VII.2.D. (Brf. of Appt. at 22 (emphasis added); R. at 17612, 22694 p. 35.) Because the City's alleged § VII.2.D. duty "ar[o]s[e] out of [TA's] agreement" in that section, it was waived in § 11 of Amendment #4.

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[7] TA and the City first entered into Amendment #4 on November 15, 2001 (R. at 16322-26), and later, on January 16, 2002, entered into "Corrected and Restated Amendment #4 to Development Agreement for Overlake Project Area." (R. at 8335-42.) References herein to Amendment #4 are to the "Corrected and Restated" version.

None of the Development Agreement provisions that TA cites imposed a maintenance duty upon the City. When TA and the City wanted to contractually agree to a maintenance obligation, they did so plainly. (E.g., R. at 14517 § XII.1.A. ("For all Park, Open Space, Trail and Buffer Areas, dedicated or accepted by the City, the maintenance of these areas shall be the responsibility of the City.").) The parties simply did not contract for a City storage lake maintenance obligation.

d. Land Application Agreement/Funding Agreement.

The Land Funding Agreement imposed no obligation on the City with regard to the storage lakes. On the contrary, that agreement made TA responsible for the lakes, as TA judicially admitted.

The Land Funding Agreement divided responsibility for new portions of the City's sewer system among the City and TA. (R. at 14549, §§ 4-3, 4-4.[8]) As TA asserts, that division was based upon the "point of discharge," so that everything on TA's side of the "point of discharge" was TA's responsibility, and everything on the City's side of the "point of discharge" was the City's responsibility. (Id.) The "point of discharge" is defined as "the point at which the treated effluent leaves City property and enters property owned by [Tooele] Associates." (Id. § 4.1.) That point is the fence around the 30-acre site of the City's wastewater treatment plant, as that is the point where the effluent leaves City property and enters property owned by TA. (R. at 18851 (Mr. Hall

[8] There is a problem in the numbering of the record on appeal. After record page 14553, the numbers 14544-14553 are repeated. The record pages with the Land Application Agreement/Funding Agreement are on the first pages labeled 14546-53.

testified that the "point of discharge" was "that fence fencing the 30 acres").) Inside that fence, the City had responsibility, and TA had responsibility for everything outside that fence. The storage lakes are all located outside that fence. (R. at 6750 ¶ 10, 6758-63.)

Indeed, TA did not controvert, and thus admitted, the following facts from the City's Memorandum in Support of Tooele City's Motion for Partial Summary Judgment on Tooele Associates, L.P.'s Storage Lake Claims:

> 2. On June 1, 1996, TA and the City entered into the Land Application Agreement/Funding Agreement. (Id. Ex. N.) **Under the Land Application Agreement/Funding Agreement, all obligations with respect to the storage lakes were TA's**: "ASSOCIATES shall be responsible for all installation and operating costs, including maintenance and repairs, for all facilities located within property not owned by the CITY, up to the point of discharge." (Id. Ex. N at 4, § 4-4; First Am. Cmplt. ¶ 95.)
>
> 3. The Land Application Agreement/Funding Agreement defines the "point of discharge" as "the point at which the treated effluent leaves City property and enters property owned by Associates." (Ex. 2 (Dev. Agr.) Ex. N at 4, § 4.1.) **That point is the fence around the approximately 30-acre site of the City's wastewater treatment plant, as it marked the boundary between City property and TA property.** (Ex. 3 (Hall Depo.) at 949-51; Ex. 2 (Dev. Agr.) at 2, § 8., Ex. A.)

(R. at 14436-37 (emphasis added), 14972.)

The reason TA did not controvert those facts is that TA had judicially admitted in its Second Amended Complaint that the storage lakes fell on its side of the "point of discharge" division of responsibility:

> Although **Tooele Associates originally was obligated to construct and pay for the 17 storage lakes and related facilities (under the Land Funding Agreement),** that obligation was, under the Development Agreement, shifted to the City.

(R. at 13440, ¶ 75 (emphasis added); see also R. at 2638 n.2, 2649, 3759 ¶ 11.b., 3777 ¶ 95.) Because the Land Funding Agreement allocates responsibility for facilities depending on which side of the "point of discharge" they were on, and TA admitted that the storage lakes were on its side of that point, the Land Funding Agreement could not form the basis for a City contractual duty with respect to the storage lakes.[9]

Even if the Land Funding Agreement required the City to follow "applicable Federal and State of Utah Division of Water Quality laws and regulations" on TA's side of the "point of discharge," TA has identified no law or regulation "applicable" to the storage lakes or to storage lake maintenance. The only law or regulation TA identifies – Utah Admin. Code R317-3-10(E)(2) (1997) – dealt with "Lagoons," *not* storage lakes; and it identified "[d]esign" standards for lagoons "as constructed or installed," *not* maintenance standards:

> 10.3 Basis of **Design**. . . .
>
> . . . .
>
> E. Seepage.
>
> . . . .

[9] The Land Funding Agreement further limits the City's responsibility to facilities "within property owned by the CITY." (R. at 14549 § 4-3.) As the district court noted, the earliest that the City owned the storage lakes was August 2006. (R. at 18894 n.2.) TA did not purport to convey to the City title to the storage lakes until April 3, 2002. (R. at 14828.) TA, however, could not have conveyed title to the storage lakes in 2002, because it had previously, on November 20, 1998, deeded such title to Overlake Golf, LLC. (R. at 6750 ¶ 17, 2782.) When the City learned of the November 20, 1998 transfer to Overlake Golf, LLC, it sought, and the district court granted, leave to amend its pleadings to assert a claim against TA for breach of its warranty deed. (R. at 2701-03, 2739, 2759-60, 3597-98, 4540-41.) In August, 2006, Overlake Golf, LLC executed a quit-claim deed to TA for the storage lake property. (R. at 14832-41.)

> 2. Hydraulic conductivity of the **lagoon** bottom **as constructed or installed**, shall be such that it meets the requirements of ground water discharge permit issued under R317-6, (Ground Water Quality Protection rules). It shall not exceed 1.0 x 10^{-6} centimeters per second.

(R. at 18820 ¶ E.2. (emphasis added).)

The storage lakes are not "lagoons." (R. at 14798-800.) "'[L]agoons hold raw sewage.'" (R. at 14611; see also Utah Admin. Code R317-1-1.29 (identifying "lagoon" as a type of "[t]reatment work[]" "used for the purpose of treating, holding, or stabilizing wastes").) By contrast, the storage lakes hold wastewater that has undergone an advanced cleansing process. (Brf. of Appt. at 4.) To the district court, TA conceded that "the storage ponds are not lagoons designed to store raw sewage." (R. at 14986.) Because the storage ponds are not "lagoons," the Engineering Manager One of the Division of Water Quality, a division of the Utah Department of Environmental Quality ("DEQ"), testified that the DEQ simply "doesn't care" if the storage lakes leak "excessively":

> Q. So you care if there's too much water in the lakes. But do you care if there's not enough water in the lakes? In other words, if it just passes all through, does the DEQ care about it?
>
> A. Well, yes and no. **No, DEQ doesn't care about it if it just passes all through.**
>
> . . . .
>
> Q. And I take it from the rest of your answer earlier that, **if there is an excess seepage, as long as it's not damaging the groundwater, which has already been determined, then the division doesn't care; right?**

A. **That's true. Yes.**[10]

(R. at 14610, 14612-13, 14617 (emphasis added).) Indeed, TA conceded that the standards applicable to the storage lakes "are not the State of Utah lagoon standards."[11] (R. at 14987.)

Even if the storage lakes were "lagoons," the City satisfied R317-3-10(E)(2), because that regulation sets forth "[d]esign" criteria for lagoons "as constructed or installed," *not* a maintenance standard. (R. at 18820 ¶ E.2.) The regulation is part of the "*Design Requirements* for Wastewater Collection, Treatment and Disposal Systems,"[12] *not* the "Ground Water Protection Rules," as TA incorrectly asserts. (Brf. of Appt. at 37.) It is undisputed that the storage lakes were properly designed and constructed. (R. at 14583-85.) Therefore, even if they were lagoons, the storage lakes satisfied R317-3-10(E)(2).

C. TA Has No Development Agreement Rights That Depend On 17 Storage Lakes That Leak Less Than ¼" Per Day.

TA suggests that it is deprived of Development Agreement rights that depend upon 17 storage lakes that do not excessively leak. TA argues that it is "obligated by the Development Agreement to purchase all of the treated wastewater generated by the plant"; sewer service in Overlake depends on the storage lakes; the storage lakes "serve

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[10] One of the reasons the DEQ is unconcerned with storage lake seepage is that the City obtained an "alternate discharge permit" from the DEQ. (R. at 14613.)

[11] If the storage lakes were "lagoons," TA could not develop any property "for residential or commercial or institutional purposes" within "a minimum of ¼ mile" from each storage lake. Utah Admin. Code R317-3-10.1A. (R. at 18818.)

[12] Utah Admin. Code R317-3 (emphasis added).

as water hazards and add ambience to the [Overlake Golf] Course"; and TA has a right to the implementation of the secondary water system it sold to the City through Amendment #4 of the Development Agreement. (Brf. of Appt. at 16-17.) TA's assertions are incorrect.

1. TA Was Not Required To Purchase All Treated Effluent.

TA is incorrect in asserting that it was required to purchase all treated wastewater. TA's assertion is based on another provision of the Development Agreement – § V.2.B. – that was superseded in Amendment #4 to the Development Agreement. (Brf. of Appt. at 16 (citing R. at 14509).) The original Development Agreement required TA to purchase "all treated wastewater" because TA was responsible for distributing all the water. (R. at 14508 § V.1.G. ("Transfer of Ownership of Secondary Water Facilities"), 14509 § V.2.B.)

Amendment #4 changed that. Under that agreement, the TCWSSD acquired the secondary water system that TA built to distribute secondary water in the Overlake phases. (R. at 16323 § 1.) When the TCWSSD took over that system, TA was relieved of the obligation to purchase "all treated wastewater" and was required only to purchase the treated wastewater that it used to irrigate the Overlake Golf Course. Amendment #4 stated:

> 8. Purchase of Secondary Water. Paragraph V(2)(B) of the Development Agreement is hereby amended to provide that [TA] shall be entitled to purchase secondary water from the City or the District at a rate equal to the City's or the District's actual production and delivery costs, which costs are anticipated to be approximately $20 per acre-foot of water. The City or the District shall invoice [TA] on quarterly basis, based upon

> actual secondary water meter readings. [TA] shall pay all invoices within thirty days of issuance.

(R. at 8337 § 8, 15817-18.) Amendment #4 required TA to buy only the water it needed for golf course irrigation. (R. at 8337 § 8, 15817-18.) Indeed, if TA had to buy all the treated wastewater, there would be none left for the TCWSSD to distribute through its secondary water system. Accordingly, following Amendment #4, the only purpose for the storage lakes that TA has a contractual right to demand is that they store enough water for golf course irrigation. TA did not dispute that the Overlake Golf Course has always had enough irrigation water. (R. at 14445, 14987-88; see also R. at 14590, 1119-20 ¶ 11, 14668.)

2. There Is No Allegation In This Case That Sewer Service In Overlake Was Impacted By Any Condition Of The Storage Lakes.

TA's assertion regarding sewer service in Overlake is a red herring. TA alleged that, when it filed this lawsuit in 2002, Overlake had a population of about 1,650 people residing in about 500 homes, and there are now 660 single-family homes in Overlake with a population of about 2,300 people. (R. at 556.) If the condition of the storage lakes detrimentally impacted sewer service in Overlake, TA would have alleged that in one of its pleadings. There has never been any allegation in this case, let alone any proof, that sewer service in Overlake was in any way interrupted because of the storage lakes.

3. The Storage Lakes Are *Not* Part Of The Overlake Golf Course.

TA asserts that the storage lakes are part of the Overlake Golf Course and, therefore, should be maintained as golf course water hazards and amenities. TA, however, did not controvert the following facts in the fact section of the City's

memorandum in support of its motion for summary judgment on TA's storage lake allegations:

> 21. **Nor are the storage lakes part of the golf course**. Forsgren designed the storage lakes and built the Overlake Golf Course. Its President, Richard Noll, testified that storage lakes are separate from the golf course: "**The lakes were no more part of the golf course than the homes being built around the golf course would be part of the golf course. That's a separate project.**" (Ex. 25 (Noll Depo.) at 38.) **Mr. Hall also testified that the storage lakes are not part of the golf course.** (Ex. 3 (Hall Depo.) at 463-69, 955-58; see also Ex. 26 (12/28/95 Memo. from R. Noll to Mayor Pendleton, et al.); Ex. 27 (4/2/96 Agr. for Eng. Servs. Betw. TA and Forsgren).)
>
> 22. TA insists that the storage lakes are separate from the golf course because otherwise, the Development Agreement would have required TA to own and maintain them. The Development Agreement required the Overlake Golf Course to be privately owned and operated. (Ex. 2 (Dev. Agr.) 17, § X.2.B.)

(R. at 14442-43 (emphasis added) (footnote omitted), 14985-86.) By not controverting these facts, TA admitted them. (R. 14790, 14588-89.)

The storage lakes' operation is incompatible with the notion that they are golf course water hazards and amenities. According to TA's own evidence, the storage lakes were intended to empty during the golf season to make room for winter storage. (R. at 15416 ("Under planned, normal operations, the ponds would be filled during the winter time and water would be withdrawn from the ponds over the summer months to provide makeup water for irrigation."); R. at 3780 ¶ 115, 15478-81.) In fact, while the DEQ was indifferent to storage lake seepage, it was concerned about overflows and required the storage lakes to empty during golf season to make room for effluent treated over the

winter. (R. at 14612-13.) Thus, if the City maintained the storage lakes as golf course water hazards, it would run afoul of DEQ requirements.

The storage lakes that TA argues are part of the "ambiance of the golf course" – Lakes 5-7 and 12-17 (R. at 15773-74, 14566-67) – either hold water well or were intended to be empty during golf season. (R. at 15479-81, 16029.) According to the 2002 reports presented by TA, Lakes 12-17 hold water well. (R. at 15054-57, 15062, 15437.) Lakes 12-17 were holding water so well, that those reports recommended no remedial action as to them because "an unqualified reduction in pond leakage should be anticipated over time" "due to sealing by algae growth and gradual filling of the ponds with sediment." (R. at 15437, 15062-63.)

The other storage lakes that are allegedly within the "golf course ambience" – Lakes 5, 6, and 7 – were, according to TA's evidence, intended to be "low priority lakes," which means that "[t]hey really have no purpose other than to store water in the wintertime." (R. at 15481, 15040-41, 15043.) Mr. Hall admitted that "[t]he normal operation" of Lakes 5-7, along with all but two of the other lakes, was to keep them as empty as possible:

> Q. . . . . Take a look at the first paragraph in Section 6.3.2, which is routine water transfer from lakes. I'll go ahead and just read it into the record.
>
> The normal operation of the storage lakes will be to maximize the amount of reuse water available for land application through the . . . secondary water distribution system. This will be accomplished by discharging treated effluent directly to lakes No. 4 and 17 and **only using the other storage lakes as needed to keep up with the production of the WWTP. This means the normal operation of the control gate for lake No. 17 is to keep it in the closed mode so that the maximum amount of reuse**

water can be stored in this lake without spreading it out over several lakes that would result in increased evaporation and seepage.

Is this consistent with how you understood the normal operation of the storage lakes would be?

A. **Correct.**

(R. at 14587-88 (emphasis added).) In sum, there is simply no contractual support for the notion that the storage lakes were to be maintained as golf course water hazards and for golf course ambience, and their operation, as understood and accepted by all concerned, is incompatible with that function.

4. The District Court Repeatedly Ruled That TA Has No Contractual Right To The Implementation Of The Secondary Water System, And Those Rulings Are Not Before This Court.

TA's assertion that leaky storage lakes frustrate its expectations regarding the implementation of the secondary water system is an attempt to challenge district court rulings that are not on appeal. The district court repeatedly ruled that the Development Agreement imposed no duty on the City to implement the secondary water system. (R. at 3593 ("Nothing in Amendment #4 provides any such duty [to obtain a DEQ permit to operate the secondary water system] upon the City. . . ."), 20836 ("The Court has already held that the City had no duty to implement the secondary water system."), 21864, 21868 ¶ 10, 21872 ¶ 24.) These rulings are not before this Court. (R. at 22344-45.) Because the Development Agreement contained no duty on the City's part to implement the secondary water system, TA had no contractual expectation that the secondary water system would be implemented.

D. TA Repeatedly Admitted That The City Owed TA No Contractual Duty To Maintain The Storage Lakes.

Mr. Hall testified during his deposition that the City entered into no storage lake maintenance agreement with TA:

> The fact is the City has . . . failed to enter into any kind of maintenance agreement for the storage lakes. . . .

(R. at 14553.) In its correspondence, TA admitted that there was no contract in which the City agreed with TA to maintain the storage lakes. In a March, 2000 letter to the State of Utah Department of Water Quality ("DWQ"), Mr. Hall urged the DWQ to prohibit operation of the City's new wastewater treatment plant, in part, because there was no contract between TA and the City regarding storage lakes maintenance:

> 6. Lack of Maintenance Contracts: Tooele City must maintain the storage lakes. This will require a storage lake's maintenance agreement between Tooele City and [TA]. **No agreement exists.** We request that the state require that Tooele City and [TA] enter into a maintenance contract prior to issuing a permit to operate.[13]

(R. at 14623-24; see also R. at 14629 (5/17/00 letter from D. Hall identifying as an issue needing resolution "[m]aintenance agreements for secondary water storage lakes"); 14637-38 (6/25/01 letter from D. Hall enclosing proposal including term that: "12. Tooele City and Overlake enter into a maintenance agreement for the storage lakes as previously discussed").)[14]

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[13] The DWQ had no interest in whether the City had a maintenance agreement for the storage lakes. (R. at 14618-19, 14622-23.)

[14] TA argued to the district court that its admissions of no storage lake maintenance agreement with the City were inadmissible under the parol evidence rule. "The parol evidence rule only purports to foreclose events which precede or accompany a written or oral integration, not those which come later." Wilson v. Gardner, 348 P.2d

The City tried to negotiate a storage lake maintenance agreement with TA, but TA withdrew from the negotiations. Initially, TA and Overlake Golf Course personnel operated and maintained the lakes. (R. at 14640-56, 14561-75, 14659, 14666-68, 14662 (7/16/02 letter from D. Hall stating "For the past 2 years Overlake employees have spent considerable time . . . managing problems with the Lakes.").) In September, 2001, TA entered into a contract with the City, whereby TA agreed "to complete required maintenance work on the Tooele City wastewater storage lakes," and, according to Mr. Hall's deposition testimony, TA made repairs, including to erosion damage. (R. at 14640-56, 14686-88, 14561-65, 14569.) Thereafter, the City and TA attempted to negotiate another storage lakes maintenance agreement in which "the City [would] tak[e] control and responsibility for all repairs, maintenance, and operation of the storage lakes" (R. at 14691-92; see also R. at 14673, 14676, 14679, 14684-85.) TA, however, terminated those negotiations. (R. at 14554-55.)

931, 933 (Utah 1960) (emphasis added); see also Tangren Family Trust v. Tangren, 2008 UT 20, ¶ 11, 182 P.3d 326, 330 ("We have expounded on the parol evidence rule on a number of occasions and explained that 'as a principle of contract interpretation, the parol evidence rule has a very narrow application. Simply stated, the rule operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract.'" (quoting Hall v. Process Instruments & Control, Inc., 890 P.2d 1024, 1026 (Utah 1995)); Salamon v. Cirtran, 2006 U.S. Dist. LEXIS 6891, *3 (D. Utah Feb. 1, 2006) ("Thus, the parol evidence rule only 'foreclose[s] events which precede or accompany a written or oral integration, not those which come later.'" (quoting Wilson, 348 P.2d at 933)). None of TA's admissions of the lack of any storage lake maintenance agreement "precede or accompany" the Development Agreement, so they are not foreclosed by the parol evidence rule.

E. The Storage Lakes Did, In Fact, Receive, Hold, Store, And Circulate Treated Wastewater, And Nothing In The Development Agreement Indicated That The Amount Of Water Received, Held, Stored, And Circulated Was Insufficient.

According to Mr. Hall's affidavit testimony and judicial admissions in TA's own Second Amended Complaint, "[t]he City completed construction of the 17 storage lakes about January 1, 2000."[15] (R. at 567 ¶ 88, 3783 ¶ 128; 13441 ¶ 81, 23317 ¶ 104.) Since then, the storage lakes have, in fact, received, held, stored and circulated treated wastewater.

As TA admits, the storage lakes were never intended to be watertight; they were designed to leak. (Brf. of Appt. at 9.) In fact, the storage lake design that the City implemented was the design that TA commissioned when TA was going to construct the storage lakes. (R. at 15029 ("[T]he original client (Overlake) opted for use of the compacted native soil liner. When the City became directly involved with the construction of the storage lakes, the various options were again reviewed and direction was given to proceed with a compacted native soil liner."), 15456-57.) Through its storage lake leakage expert, Jim Riley, TA admits that, for the most recent year evaluated, 2006, it was appropriate for the storage lakes to have "Design Seepage" of between 170,000,000 and 174,000,000 gallons of treated wastewater. (R. at 15503-17, 16329-42.)

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[15] These judicial admissions refute TA's assertions that the lakes were completed in 1999. Baldwin v. Vantage Corp., 676 P.2d 413, 415 (Utah 1984) ("An admission of fact in a pleading is normally conclusive on the party making it.").

The storage lakes receive, hold, store and circulate treated wastewater. TA did not controvert the following fact from the City's memorandum in support of its motion for summary judgment on TA's storage lake allegations:

> 31. The Overlake Golf Course has always had enough irrigation water. (Ex. 3 (Hall Depo.) at 1009; Ex. 14 (Hawkins Depo.) at 17.)

(R. at 14445, 14987-88; see also R. at 14590, 1119-20 ¶ 11, 14668, 15031.) The district court found that TA admitted this fact, a finding TA does not challenge in its brief to this Court. (R. at 18893.)

Because the golf course is irrigated exclusively from the storage lakes (R. at 568 ¶ 99), TA's admission means that the storage lakes have received, held, stored, and circulated at least enough water for golf course irrigation. The golf course uses vast amounts of water. During the peak months of irrigation season, the Overlake Golf Course uses 1,600,000 gallons of water each day for irrigation, out of a total 1,600,000 to 2,100,000 gallons per day discharged from the wastewater treatment plant. (R. at 567-68 ¶¶ 91, 100) TA's expert concluded that the Overlake Golf Course uses 521 acre feet of water per year, which when converted to gallons equals almost 170,000,000 gallons of water stored and circulated in the storage lakes (521 acre feet x 325,808.8 gallons/acre foot = 169,746,384.8 gallons). (R. at 15503-17, 16332, 16335.) Indeed, the lakes hold so much water that, according to judicial admissions in TA's Second Amended Complaint, they "overflow[ed] on one or more occasions."[16] (R. at 13449 ¶ 129.b.; see also R. at

[16] TA's judicial admissions of storage lake overflows belie TA's assertion that "[t]he storage ponds have never been filled to capacity, or even close to their capacity." (Brf. of Appt. at 12.) For that assertion, TA cites only affidavit testimony of Mr. Hall,

1118-19 ¶ 8, 14684.) Thus, the storage lakes received, held, stored and circulated at least enough water for golf course irrigation, and nothing in the Development Agreement indicates that 170,000,000 gallons is not enough water for the storage lakes to hold.

The storage lake seepage has reduced over time. As support for the assertion that the storage lakes leak excessively, TA relies on reports from Forsgren and AMEC Earth and Environmental ("AMEC") and the opinion of Mr. Riley.[17] (Brf. of Appt. at 10-13.) The reports, however, were both done in 2002, and they predicted that the leakage would abate over time based on "sealing by algae growth and gradual filling of the ponds with sediment." (R. at 15021, 15412, 15437, 15062-63.) In fact, since 2002, the lake leakage has reduced (R. at 1119 ¶ 10), as TA's own storage lake leakage expert has found. Specifically, Mr. Riley found that the most the lakes leaked beyond design specifications was 1,039.96 acre feet in 2002, and the leakage has reduced in the years since. (R. at 15503-17.[18])

TA has no basis to identify the amount that the lakes "currently are seeping." (Brf. of Appt. at 12 (citing R. at 15499-500).) Its expert's most recent leakage

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but in his deposition, Mr. Hall testified to several storage lake overflows. (R. at 15790, 15792, 15799, 15802, 15805-06.) An affidavit may not contradict prior sworn testimony to create an issue of fact. Brinton v. IHC Hosps., Inc., 973 P.2d 956, 973 (Utah 1998).

[17] As TA admitted to the district court, however, "[n]either Forsgren nor AMEC conducted any seepage tests on pond nos. 5, 8 and 9." (R. at 18790.) Thus, there is no evidence of the rate of seepage applicable to those lakes.

[18] These record pages contain Mr. Riley's leakage calculations. The column headed "Spill????" is the column with Mr. Riley's "amount of excess seepage." (R. at 16330.)

calculations are for 2006,[19] the result of which are leakage amounts that are 38-44% of the maximum leakage amount TA alleges – 1,531 acre feet or 498,843,893 gallons.[20] (Brf. of Applt. at 12, 19.) Although TA repeatedly supplemented its expert's opinions, including as recently as January 23, 2009 (R. at 18802), TA decided not to have its expert evaluate the storage lakes for any time beyond 2006. The trend, however, suggests further reductions in storage lake leakage.

F. TA Caused Storage Lake Leakage.

TA has only itself to blame for storage lake conditions that arose between the storage lakes' completion on January 1, 2000 and at least up until September 2001. During that period, TA undertook to maintain and manage the storage lakes. (R. at 14640-56, 14561-75, 14659, 14666-68, 14662.) In September, 2001, TA entered into a contract with the City whereby TA agreed "to complete required maintenance work on the Tooele City wastewater storage lakes." (R. at 14640-56, 14686-88, 14561-65, 14569.) Had TA performed the maintenance agreement as promised, any problems arising from the start-up should have been cured. If those problems persisted, as TA now argues, TA is responsible for them.

In addition, during TA's construction of the golf course, TA penetrated the sides of the storage lakes with drainage pipes and altered the typography surrounding the lakes,

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[19] R. at 15503-17.

[20] That amount is substantiated nowhere in Mr. Riley's calculations, attached as Appendix #5 to his report. (R. at 15502-17.) The most that Mr. Riley found that the lakes excessively leaked was 1,039.96 acre feet in 2002. (R. at 15503.) The excessive leakage amounts that Mr. Riley found for 2006 are 56% - 65% of that 2002 amount. (R. at 15505, 15508, 15511, 15514, 15517.)

both of which channeled storm water into the storage lakes that eroded the liners. (R. at 16013-17, 16353-88, 16411-21, 16424-37, 16440.) Also, Mr. Hall dug holes into two of the storage lakes with a pick and shovel, which likely compromised the lake liners. (R. at 1120 ¶ 12, 16351-52.)

VII. SUMMARY OF THE ARGUMENT.

It was undisputed in the district court that the storage lakes' design and construction are beyond reproach, leaving TA to argue that improper maintenance was the cause of excessive storage lake seepage. TA, however, could not identify any contractual duty on the City's part to maintain 17 storage lakes in any way, let alone to a ¼" per day seepage standard. Moreover, TA has made clear that it seeks a decree of specific performance on its storage lake allegations, and specific performance is properly declined where the terms to be enforced are omitted from, or only vaguely included in, the parties' contract.

TA's storage lake allegations are mooted by TA's formal election of expectancy damages on its Development Agreement claim. Again, TA seeks specific performance on its storage lake allegations, but to the district court, TA elected expectancy damages on the rest of its Development Agreement claim, including TA's allegation that it was deprived of a second ten-year term of the Development Agreement. TA may not obtain both a decree of specific performance and expectancy damages, so its election moots this appeal.

This Court lacks subject matter jurisdiction because claims remaining before the district court overlap factually with TA's storage lake allegations. For example, the

City's material breach of the Development Agreement claims remain before the district court, and those claims prevent the entry of summary judgment in TA's favor on its storage lake allegations. Accordingly, this Court should dismiss this appeal.

VIII. ARGUMENT.

A. The District Court Acted Within Its Discretion In Denying TA An Equitable Decree Of Specific Performance.

The issue on this appeal is not whether TA had a triable claim for breach of contract based on its storage lake allegations. TA made clear that the relief it sought on its storage lake allegations was an equitable decree of specific performance. The review of an order denying specific performance differs from the review of an order simply dismissing a breach of contract claim. For one, "[i]t may be that the terms [of a contract] are certain enough to provide the basis for the calculation of damages but not certain enough to permit the court to frame an order of specific performance." Brown's Shoe Fit Co. v. Olch, 955 P.2d 357, 365 n.8 (Utah Ct. App. 1998); see also Pitcher v. Lauritzen, 423 P.2d 491, 493 (Utah 1967) ("'A greater degree of certainty is required for specific performance in equity than is necessary to establish a contract as the basis of an action at law for damages.'" (quoting 49 Am. Jur. Specific Performance § 22)). It would serve no purpose to review whether TA's storage lake allegations would support a claim for damages when TA does not seek damages on its storage lake claims but instead seeks specific performance. Accordingly, the issue is whether the district properly denied TA an equitable decree of specific performance.

1. The Development Agreement Did Not Establish A Storage Lake Maintenance Or Leakage Standard.

To establish a breach of contract claim, the plaintiff must identify a duty imposed by its contract with the defendant that the defendant breached. ELM, Inc. v. M.T. Enters., Inc., 968 P.2d 861, 863-64 (Utah Ct. App. 1998). When the plaintiff seeks a decree of specific performance, the contract must even more clearly impose the duty sought to be enforced:

> [S]pecific performance cannot be required unless all terms of the agreement are clear. The court cannot compel performance of a contract which the parties did not mutually agree upon. Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491, 493 (1967).
>
> . . . When the parties leave material matters so obscure and undefined that the court cannot say whether the minds of the parties met upon all the essentials or upon what substantial terms they agree, the case is not one for specific performance.

Southland Corp. v. Potter, 760 P.2d 320, 322 (Utah Ct. App. 1988).

> In speaking in certain terms required for specific performance, the author in 49 Am. Jur., *Specific Performance*, . . . uses this language:
>
> "The contract must be free from doubt, vagueness, and ambiguity, so as to leave nothing to conjecture or to be supplied by the court. It must be sufficiently certain and definite in its terms to leave no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is called upon to have performed, and it must be sufficiently certain as to its terms so that the court may enforce it as actually made by the parties."

Pitcher, 423 P.2d at 493 (quoting 49 Am. Jur., Specific Performance § 22).[21]

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[21] See also Eckard v. Smith, 527 P.2d 660, 662 (Utah 1974) ("Specific performance cannot be granted unless the terms are clear, and that clarity must be found from the language used in the document."); Barnard v. Barnard, 700 P.2d 1113, 1114 (Utah 1985) ("Specific enforcement may be granted only if the parties' intent as to the essential terms of the agreement is clear."); 1-800 Contacts, Inc. v. Weigner, 2005 UT

Courts refuse specific performance decrees in situations where there was actually a contractual duty, but the contract was too uncertain to fashion a decree. In a decision cited with approval in Southland Corp., the Tenth Circuit held that an agreement for "appropriate" warranties was inappropriate for enforcement through specific performance because "[t]he letter agreement was incomplete and unclear in that it did not spell out just what warranties . . . were 'appropriate.'" D.H. Overmeyer Co. v. Brown, 439 F.2d 926, 929-30 (10th Cir. 1971). Another case, Gee v. Payne, 939 S.W.2d 383, 387-88 (Mo. Ct. App. 1997), involved a contract that "mandate[d] extension of a road but ma[d]e no definite terms relating to the quality of the road," so the appellate court found "[n]o abuse of discretion . . . in the trial court's failure to award specific performance." In Colorado Corp. v. Smith, 263 P.2d 79, 81 (Cal. Ct. App. 1953), the court held that a contract to build homes that omitted specifications for the homes was "all too vague" to be enforceable by specific performance. In CBL & Assocs., Inc. v. McCrory Corp., 761 F. Supp. 807, 808-09 (M.D. Ga. 1991), the court refused to decree specific performance of a contract requiring a tenant to operate "'with due diligence and efficiency'" as "[t]he language . . . of the lease gives requirements which are simply too vague to be enforced."

TA presents no contractual terms that require the City to maintain 17 storage lakes, let alone terms that are clear enough to be enforced through specific performance. Considering the Development Agreement's integration clause – § XXI – "any duty

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App 523, ¶ 8, 127 P.3d 1241 ("Specific performance is an equitable remedy which 'cannot be required unless all terms of the agreement are clear. The court cannot compel the performance of a contract which the parties did not mutually agree upon.'" (quoting Pitcher, 423 P.2d at 493)).

imposed upon [the City] . . . had to be negotiated and reduced to writing." ELM, Inc., 968 P.2d at 864; see also Tangren Family Trust v. Tangren, 2008 UT 20, ¶ 16, 182 P.3d at 331. TA presents no duty to maintain the storage lakes to any standard that was "negotiated and reduced to writing" in the Development Agreement. Instead, TA primarily argues about water conservation and how "everyone benefits" from storage lakes that do not leak excessively. None of TA's arguments are supported by the terms of the Development Agreement. It may be true that water is conserved and "everyone benefits" from 17 storage lakes that leak no more than ¼" per day, but the City never promised to TA in a contract that it would maintain 17 storage lakes to that standard.

TA places most emphasis on Development Agreement language, within a section dealing with "Tooele Associates Obligations," indicating that the City would "provide" storage lakes "to receive and hold treated wastewater." (Brf. of Appt. at 21 (quoting R. at 14514 § VII.2.D).) The term "provide," however, does not indicate a continuing maintenance obligation, let alone one that can form the basis for a specific performance decree. TA insists that the term must require more than "paying for" the storage lakes' installation, but that is exactly how the Utah Supreme Court has construed the word. In Backman v. Salt Lake County, 375 P.2d 756, 759 (Utah 1962), the Court interpreted the word "provide" to mean "pay the costs of."

2. Extrinsic Materials And Conduct May Not Be Used To Establish A Duty Owed To TA Under The Development Agreement.

TA argues that evidence extrinsic to the Development Agreement, specifically the engineering and construction plans for the storage lakes and the City's alleged conduct,

"fleshed out" the Development Agreement's omission of a leakage standard. (Brf. of Appt. at 39.) The Development Agreement was not "missing detail" that the parties intended to later supply. It simply did not contain the contractual obligation TA is trying to enforce.

TA's reliance on matters extrinsic to the Development Agreement proves that the district court was right to refuse specific performance. Under Utah law, "[s]pecific performance cannot be granted unless the terms are clear, **and that clarity must be found from the language used in the document.**" Eckard, 527 P.2d at 662 (emphasis added). The fact that TA needs to resort to matters outside the Development Agreement to try to establish a storage lake maintenance standard is enough to affirm the district court's decision.

TA relies upon Restatement (Second) of Contracts § 34 (1981), but it has no application. The rule in § 34 applies only if **the contract itself** provides the method by which the "missing detail" is "fleshed out," as demonstrated in the Restatement's illustration:

> 1. A promises B to give him any one of a number of specified things which A shall choose, and B promises A to pay a specified price. The agreement is sufficiently definite to be a contract. **A method is provided for determining what A is to give**; though what he gives is subject to his choice, he must give some one of the things specified.

Restatement (Second) of Contracts § 34 cmt. a illus. 1 (1981) (emphasis added).

Controlling case law also restricts the rule to situations in which the contract itself provides a method for "flesh[ing] out" details. In Prince, Yeates & Geldzahler v. Young, 2004 UT 26, 94 P.3d 179, the Utah Supreme Court considered the enforceability of a

promise by the law firm "to be 'fair' in negotiating the amount of 'fair and equitable' compensation" to one of its lawyers. Id. ¶ 15. The Court applied the rule, "'So long as there is **any** uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract.'" Id. ¶ 17 (emphasis added) (quoting Candland v. Oldroyd, 67 Utah 605, 248 P. 1101, 1102 (Utah 1926)). The Court found the promise too indefinite to enforce because "the parties never agreed upon the specific amount of, or formula to determine," the lawyer's compensation. Id.[22]

In this case, TA concedes that some storage lake seepage is acceptable, but the Development Agreement provides no "specific amount of, or formula to determine" impermissible seepage. Prince, Yeates & Geldzahler, 2004 UT 26, ¶ 17. The only contractual provisions TA has identified consist of terms that dealt with "Tooele Associates Obligations," not the City's, but even if those terms could somehow form the basis for a City contractual duty to make sure the storage lakes "receive," "hold," "store," and "circulate" water, those terms establish no "method for determining" how much water the storage lakes must receive, hold, store, and circulate. Richard Barton Enters., Inc., 928 P.2d at 373-74. The storage lakes do, in fact, receive, hold, store, and circulate

[22] See also Nunley v. Westates Casing Servs., Inc., 989 P.2d 1077, 1084-86 (Utah 1999) (refusing to enforce stock purchase agreement when parties failed to agree "on the critical issues of how, when and on what terms" defendant could purchase stock); Richard Barton Enters., Inc. v. Tsern, 928 P.2d 368, 373 (Utah 1996) ("As Corbin notes, when parties have not agreed on a reasonable price or a method for determining one, 'the agreement is too indefinite and uncertain for enforcement.'") (quoting 1 Joseph M. Perillo, Corbin on Contracts § 4.3 (rev. ed. 1993)); Valcarce v. Bitters, 362 P.2d 427, 428-29 (Utah 1961) ("A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced.")

treated wastewater – at least enough for golf course irrigation, which, according to TA's expert, is 521 acre feet, or about 170 million gallons, per year. Nothing in the Development Agreement indicates that the storage lakes must receive and hold more treated wastewater.

Furthermore, for the engineering and construction plans to supply terms of the Development Agreement, both TA and the City must have consented to them; they must have been referenced with "specific language" in the Development Agreement; and "the terms of the [plans] must be known or easily available to the contracting parties." Consol. Realty Group v. Sizzling Platter, Inc., 930 P.2d 268, 273 (Utah Ct. App. 1996); Housing Auth. of County of Salt Lake v. Snyder, 2002 UT 28, ¶ 19, 44 P.3d 724. TA has not satisfied these prerequisites to the use of the engineering and construction as part of the Development Agreement.

As for TA's argument that the City's conduct indicates a contractual storage lake maintenance obligation, that argument is directly contrary to TA's own evidence and admissions:

> The fact is the City has not only failed to enter into any kind of maintenance agreement for the storage lakes, from the day the storage lakes were completed the City failed to maintain the storage lakes in any way. Just a total failure to maintain the storage lakes.

(R. at 14553-54, 13443 ¶¶ 90, 95.) The City's conduct cannot possibly evidence a storage lake maintenance standard when such conduct allegedly consists of "a total failure to maintain the storage lakes."

3. The Implied Covenant Of Good Faith Cannot Be Used To Create A Duty That The Development Agreement Omits.

Unable to identify an actual Development Agreement provision that supports its storage lake allegations, TA resorts to the implied covenant of good faith and fair dealing. The implied covenant, however, "cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante." Oakwood Village, LLC v. Albertsons, Inc., 2004 UT 101, ¶ 45, 104 P.3d 1226. The storage lakes maintenance duty that TA advances is a new, independent duty to which the parties simply did not agree in the Development Agreement.

TA relies on Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, 889 P.2d 445 (Utah Ct. App. 1995), but it has no application. As explained in Oakwood Village, LLC, "Olympus Hills involved a lease between a developer and a Smith's grocery store . . . [and] Smith's operation of a warehouse box store was deemed a breach of contract because the lease contained an *express covenant of continuous operation and a restriction on the nature of operations*." 2004 UT 101, ¶ 50 (emphasis added). In this case, as in Oakwood Village, the Development Agreement contains no express term requiring storage lake maintenance with any seepage standards. Thus, Olympus Hills is inapposite.

TA argues that a City storage lake maintenance duty comports with TA's "justified expectations." (Brf. of Appt. at 31.) TA had no expectation of a City storage lake maintenance duty, let alone a justified one. Before and during this lawsuit, TA

repeatedly admitted that the City had no contract with TA regarding storage lake maintenance. In addition, TA's understanding of how the storage lakes would operate is incompatible with the idea that they would serve as golf course water hazards and amenities. TA's understanding and its admissions of the non-existence of a storage lake maintenance contract belie its argument that it had a justifiable expectation of storage lake maintenance on the City's part.

B. This Appeal Is Mooted By TA's Formal Election Of Expectancy Damages For Its Development Agreement Claim.

"'An appeal is moot if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect.'" Salt Lake County v. Holliday Water Co., 2010 UT 45, ¶ 15 (quoting State v. Laycock, 2009 UT 53, ¶ 12, 214 P.3d 104).

On October 30, 2009, TA formally elected benefit-of-the-bargain damages as its remedy for the City's alleged past and future non-compliance with the Development Agreement. (R. at 22166, 22928-29.) Such election moots this appeal for two reasons. First, the Development Agreement, including any alleged storage lakes duty, expired on December 18, 2007, and although part of TA's Development Agreement claim was that the City should have allowed TA a second ten-year term, TA has elected to cash-in the second ten-year term rather than seek specific performance for the additional term. "A [party] may not . . . recover the value of the promised performance in addition to performance of the contract itself." Quality Wig Co. v. J.C. Nichols Co., 728 S.W.2d 611, 617 (Mo. Ct. App. 1987).

Second, the remedy TA seeks on its storage lake allegations – specific performance – is inconsistent with the recovery of money damages based upon future losses. "Ordinarily, unless the court can decree specific performance as to the whole of a contract, it will not enforce any part of it." 81A C.J.S. Specific Performance § 10 (2004). Utah subscribes to this view. In Young v. Moore, 663 P.2d 78, 81 (Utah 1983), the court held, "[t]o achieve an equitable result the [specific performance] decree should provide for complete performance of the . . . agreement by both parties." Obviously, a party cannot be required to both specifically perform an agreement and pay damages based on future non-performance. "Thus, as a general rule, a party cannot have specific performance of a contract and also damages for breach of the same contract, either in single or multiple actions." 81A C.J.S. Specific Performance § 153 (2004); McCoy v. Alsup, 609 P.2d 337, 344 (N.M. Ct. App. 1980); Jacobson v. Yaschik, 155 S.E.2d 601, 607 (S.C. 1967).

Although courts may award equitable damages in addition to a decree of specific performance, such awards are incidental to the decree and are reserved for injuries that a specific performance decree cannot redress. "An award of damages or ancillary relief in a suit in equity for specific performance is given only in exception cases." McCoy, 609 P.2d at 344. An award of damages in addition to specific performance is reserved for instances in which the decree cannot make the promisee whole, such as where the promisee has been injured due to delayed performance. Eliason v. Watts, 615 P.2d 427, 430-31 (Utah 1980); Wagner v. Anderson, 250 P.2d 577, 580 (Utah 1952); Restatement (Second) Contracts § 358 cmt. c (1981). In other words, where specific performance is

appropriate, it is the main remedy (because "[t]o achieve an equitable result the [specific performance] decree should provide for complete performance of the . . . agreement by both parties"[23]) and equitable damages is the gap filler.

This case is the exact opposite. TA seeks damages on its entire Development Agreement claim, including the deprivation of a second ten-year term of that agreement, except for its storage lake allegations. In other words, TA wants a damages judgment with an incidental decree of specific performance. Under fundamental principles, a party may not carve up its contract and obtain damages for future losses from the non-performance of certain provisions and specific performance of another. TA has elected monetary damages on its Development Agreement claim, and such election prevents TA from seeking specific performance. Because TA seeks only specific performance on its storage lake allegations, and it has elected damages on the rest of its Development Agreement claim, its storage lake allegations are moot.

C. This Court Lacks Subject Matter Jurisdiction Because Claims Remaining With The District Court Factually Overlap With TA's Storage Lake Allegations On Appeal.

The district court certified its summary judgment ruling as final under Utah R. Civ. P. 54(b), but appellate courts lack jurisdiction over orders incorrectly certified. Coffredo v. Holt, 2001 UT 97, ¶ 15, 37 P.3d 1070; Weiser v. Union Pacific R.R. Co., 932 P.2d 596, 597-98 (Utah 1997). The test of whether an order is certifiable under Rule 54(b) "'focuses on the degree of factual overlap between the issue certified for appeal and

[23] Young, 663 P.2d at 81; 81A C.J.S. Specific Performance § 10 (2004).

the issues remaining in the district court.'" Williams v. Bench, 2008 UT App 306, ¶ 13, 193 P.3d 640.

The district court's Rule 54(b) certification was the subject of the City's September 25, 2009 Motion to Dismiss Appeals for Lack of Jurisdiction and Suggestion of Mootness ("Motion to Dismiss"), which this Court denied in an October 22, 2009 order. The district court's June 3, 2010 Order declaring a mistrial, however, casts new light on the issue, because that order revives the City's material breach claim, which overlaps factually with TA's storage lake allegations.

Specifically, the City's material breach claim is a defense to TA's storage lake allegations. In this appeal, TA challenges the denial of its cross-motion for summary judgment, in which it sought a judgment that the City breached the Development Agreement with respect to the storage lakes. (Brf. of Appt. at 41-42.) The City's material breach claims overlap with TA's storage lake allegations because the City is not liable for nonperformance if TA materially breached the Development Agreement. Indeed, TA must prove its own performance of the Development Agreement to enforce it. Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 22, 94 P.3d 193; Holbrook v. Master Prot. Corp., 883 P.2d 295, 301 (Utah Ct. App. 1994). Because TA's storage lake allegations overlap with the City's claims, and because the City's claims remain unresolved in the district court, the rulings in this appeal were not certifiable under Rule 54(b).

D. Even If This Court Finds That The District Court Erred, This Court Should Not Order Summary Judgment And A Decree Of Specific Performance In TA's Favor.

TA asks this Court to order summary judgment and specific performance in its favor. The Court should not do so, even if it determines that the district court erred. First, the City's material breach claims against TA preclude entry of summary judgment in TA's favor. Eggett, 2004 UT 28, ¶ 22; Holbrook, 883 P.2d at 301. Second, the City has presented evidence that TA itself caused storage lake leakage.

Third, a decree of specific performance turns not only on the terms of the contract at issue, but on other factors that have yet to be considered. To qualify for specific performance, TA must also demonstrate: (a) the unavailability of a legal remedy; (b) that it unconditionally tendered its own performance of the Development Agreement; (c) its willingness to perform its duties under the Development Agreement; and (d) that it acted equitably. Ockey v. Lehmer, 2008 UT 37, ¶ 44, 189 P.2d 51; LHIW, Inc. v. DeLorean, 753 P.2d 961, 963-64 (Utah 1988); Collard v. Nagle Constr., Inc., 2002 UT App 306, ¶¶ 19-21, 57 P.3d 603. TA has not even addressed these factors in this appeal, and they should be evaluated in the first instance by the district court. Knighton v. Bowers, 2004 UT App 110, 2004 Utah App. LEXIS 197, *2.

IX. CONCLUSION

For the above reasons, this Court should either dismiss this appeal for lack of jurisdiction, or affirm the district court's decision.

DATED this 12th day of July, 2010.

HOLME ROBERTS & OWEN LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of July, 2010, two true and correct copies of the foregoing **BRIEF OF APPELLEE, TOOELE CITY** was served via U.S. mail, postage prepaid, to:

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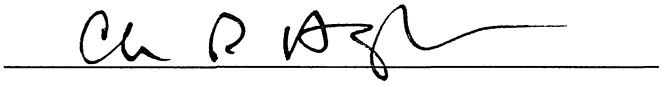

Tab A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

TOOELE ASSOCIATES, L.P., et al.,	:	MEMORANDUM DECISION AND ORDER ON MOTIONS FOR ENTRY OF JUDGMENT
Plaintiffs,	:	
		CASE NO. 060919737
vs.	:	
TOOELE CITY, a municipal corporation, et al.,	:	
	:	
Defendants.	:	
TOOELE CITY, a municipal corporation, et al.,	:	Judge Randall N. Skanchy
Third Party Plaintiffs,	:	
vs.	:	
FORSGREN ASSOCIATES, INC., et al.,	:	
Third Party Defendants.	:	

The Court has before it Tooele Associates, L.P.'s ("Tooele Associates") Rule 58A Motion for Entry of Judgment, filed October 29, 2009, and Tooele Associates' Motion for Ruling on Estoppel Claim, filed September 9, 2009, and Tooele City's Rule 54 and Rule 58A Motion for Entry of Judgment, filed August 7, 2009, and Tooele City's Cross Motion for Ruling on Estoppel Claims. Oral arguments were held January 22, 2010, at which time the Court asked the parties for further briefing on certain specified issues. Tooele Associates filed a Memorandum in Support of Harmonizing All Answers in the Special Verdict Form on

such a conclusion. The findings of the jury as reflected in the SVF are irreconcilably inconsistent, both as to each other and to the ultimate conclusions one must draw to support such an argument.

ORDER

Accordingly, this Court finds that the findings of the jury are irreconcilably inconsistent and strikes the jury's Special Verdict and declares the trial a mistrial.

Counsel are instructed to contact the Court's clerk to schedule a Scheduling Conference.

Dated this 3rd day of June, 2010.

/S/

RANDALL N. SKANCHY
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Memorandum Decision and Order, postage prepaid, to the following, this 3rd day of June, 2010:

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